Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1749

JOSEPH WATERMAN,

Petitioner

v.

~~BERNARD CHUPKA, et al.,~~ Denver Wray and Steven Kirby

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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May 16, 1977

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JOSEPH WATERMAN,
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BERNARD CHUPKA, et al.,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, JOSEPH WATERMAN, prays that a writ of certiorari issue to review the opinion and judgment of The United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The order of the Sixth Circuit Court of Appeals is without opinion and appears at Appendix A, infra, pp. 22. The judgment of the District Court, Southern District, Eastern Division appears at

Appendix B, infra, pp. 23. The Opinion of the Franklin County, Ohio, Court of Appeals appears at Appendix C, infra, pp. 24.

JURISDICTION

The order of the Sixth Circuit Court of Appeals was entered on February 15, 1977. See Sppendix A, p. 22, infra. This petition for certiorari was filed less than 90 days from the date aforementioned. The jurisdiction of this Court is invoked pursuant to 28 USC, Section 1254(1).

QUESTIONS PRESENTED

1. Whether federal courts may selectively apply issue preclusion in civil rights litigation and thus relitigate issues which were essential to an antecedent criminal judgment and which were resolved in the state courts.

2. Whether the use of Motions for Summary Judgment and Directed Verdicts in civil rights litigation may be effectively abolished by submitting an issue to the jury in a federal forum which is identical to an issue resolved by the state court in the antecedent criminal case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Section 1983, Title 42, United States Code provides that:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

3. Section 2355.02 of the Columbus City Code, Columbus, Ohio, reads in relevant part:

> . . . No person shall in any way hinder, obstruct, resist, or otherwise interfere with any duly authorized officer or member in the discharge of his official duties or attempt to prevent any officer or member from arresting any person or attempt to rescue from such officer or member any person in his custody.

STATEMENT OF THE CASE

The facts relevant to the question presented by this petition are summarized as follows.

The petitioner, Joseph Waterman, was walking along South High Street in the City of Columbus, Ohio with a lady friend on the evening of December 2, 1972 (TR. 146, 217). Several police cars had converged at the El Toro Lounge on High Street to assist an officer in the arrest of a man identified as Roscoe Dean. (TR. 147, 302, 322, 354). The petitioner and his companion joined several other people who had gathered at the scene in order to determine what was going on at the Lounge.

The testimony indicated that after the police had arrested Roscoe Dean for intoxication, the senior officer at the scene ordered his subordinates to clear

the streets. (TR. 306). Most of the crowd dispersed, and the petitioner remained standing at a distance of approximately forty feet from the cruiser where the arrested Roscoe Dean was being held.

The testimony further indicated that the petitioner was first noticed by the police after the arrest had been effectuated and that there was no disturbance at such time. (TR. 52, 53). The petitioner was asked to leave the area but refused stating that he desired to stay at the scene because he was an attorney and wanted to make certain that the man in the police cruiser was not beaten. (TR. 403, 404).

Upon refusing to leave the general area, the petitioner was arrested and charged with having violated Section 2355.02, City Codes of Columbus, Ohio, the pertinent part of which is as follows;

> * * * No person shall in any way hinder, obstruct, resist or otherwise interfere with any dxly authorized officer or member in the discharge of his official duties, or attempt to prevent any such officer or member from arresting any person, or attempt to rescue from such officer or member any person in his custody.

In a trial by jury in the Franklin County Municipal Court, Columbus, Ohio, on August 22, 1973, the petitioner was found guilty of having violated Section 2355.02 of the Columbus Code and was sentenced to pay a fine of $30.00 and costs. The petitioner appealed, and the Court of Appeals for Franklin County, Ohio reversed the trial court's decision in Columbus v. Waterman, 41 Ohio App.2d 257, 322 N.E. 2d 291 (1974). In concluding that there was no basis for petitioner's arrest, the Court stated:

> In reviewing the record herein, there is no evidence that Joseph Waterman hindered, obstructed, resisted or other-

> wise interfered with any duly authorized officer or member in the discharge of his official duties or prevented any such officer from arresting any person or attempting to rescue him. The facts herein show that the person who was disturbing the peace within the lounge had, in fact, been arrested, and the arrest was complete. (41 Ohio App.2d 102, 103).

On November 30, 1973, the present litigation was instituted in the United States District Court for the Southern District of Ohio, Eastern Division. In this suit, based upon Sections 1983 and 1985 of Title 42 of the United States Code, it was alleged that the unlawful activities of the police in arresting petitioner represented a deprivation of petitioner's civil rights.

The case was heard by a jury during the period of September 29 through October 2, 1975. On October 3, 1975, a verdict in favor of respondents-police officers

was rendered. On October 10, 1975, petitioner made a timely motion for judgment notwithstanding the verdict. This motion was overruled by the trial court on October 30, 1975.

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit on the basis of the trial court's denial of his motions for directed verdict and judgment notwithstanding the verdict. On February 15, 1977 the judgment of the District Court was affirmed.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW, IN ESSENCE, SANCTIONS APPELLATE REVIEW OF STATE COURT FINAL DETERMINATIONS BY FEDERAL DISTRICT COURTS AND THUS IS VIOLATIVE OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

It is well-settled that a defense of good faith and probable cause is available to police officers in an action under 42 USC, Section 1983. Pierson v. Ray, 386 US 547, 18 L.Ed 2d 288, 87 S. Ct. 1213 (1967). The rationale for thus protecting the officer from liability for false arrest when the suspect's innocence is later proved is expressed as follows:

> A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. (386 US, at 555)

The underlying policy for the above rule certainly serves a vital function in

society, but like any other safeguard of our legal system it is not illimitable in scope. A blanket application of the above maxim will inevitably impinge upon the well-settled rule that identical issues previously litigated should not be re-litigated. Cromwell v. County of Sac, 94 U.S. 351, 24 L.Ed. 195 (1876).

In the present case the District Court's decision to overrule petitioner's motion for a directed verdict resulted in precisely the type of situation in which bending too far to protect the interests of one party ultimately subjects the opposing party to an inexcusable deprivation of rights. Prior to the District Court trial it had been determined in the State Courts, as a mttter of law, that at the moment of petitioner's arrest there was no reasonable basis to warrant a prudent man in believing that Mr. Waterman had committed or was committing an offense

contemplated by Columbus Code, Section 2355.02.

The Franklin County Court of Appeals' recognition that the arrest of petitioner was devoid of any reasonable basis is devastatingly clear from the following excerpts from its opinion:

> In reviewing the record herein, there is no evidence that Joseph Waterman hindered, obstructed, resisted, or otherwise interfered with any duly authorized officer or member in the discharge of his official duties or prevented any such officer from arresting any person or attempting to rescue him. The facts herein show that the person who was disturbing the peace within the lounge had, in fact, been arrested, and the arrest was complete. The man had been placed in the police wagon, and the defendant and his girlfriend were some forty feet away from the El Toro Lounge and were doing absolutely nothing but standing and watching the proceedings. There has been no allegation or proof that the defendant was blocking the sidewalk, or any part of the area in which the arrest was taking place, or made any move to interfere with or abstruct the procedures of the arrest in question here.

> Significantly, the most that the evidence indicates is that defendant was merely a bystander who refused to leave the general area when requested to do so by the police officers, but defendant's remaining in no way interfered with any duty the officers were performing or anything they were doing except their desire to have defendant leave the area. There is no claim that defendant's mere presence was in violation of law, or that his remaining there was in violation of any specific statute or ordinance. Rather, there is the bare assertion that one who does not do that which a police officer tells him to do at the scene of an arrest ipso facto is obstructing the police.
>
> ...[W]e "do not find evidence in the record showing the police were obstructed, in any manner. The evidence merely shows that, despite several requests by police, the defendant refused to depart from the general area where an arrest of another had been made and was being completed. If such a refusal to follow the request of the police is to constitute an offense, it must be specifically made so by statute or ordinance. The refusal, under such circumstances, does not constitute an obstruction of the police.
> (Petitioner's appendix C, 41 O. App.2d 102-104).

By overruling petitioner's motion and disregarding the conclusion of the state court which was based upon overwhelming evidence, the District Court provided a second opportunity for the police officers to cure the defects which were manifest in the first assessment of the reasonableness of petitioner's arrest. In affirming this allowance of a "fresh start", the Sixth Circuit Court of Appeals apparently concurs in the view that Federal Courts may routinely retry issues irrespective of state court determinations regarding the identical matters. It is respectfully submitted that such a view reaches beyond the scope of Pierson and is constitutionally impermissible.

In advancing the theory that issues in civil rights litigation may be precluded from redetermination in the federal courts, petitioner relies upon a common practice in

a majority of Federal Circuits. The Court in Pyles v. Keane, 418 F. Supp. 269 (S.D. New York, 1976) states at page 273:

> Although there remains some question whether collateral estoppel applies in a civil rights action where issue preclusion is based upon a prior State criminal judgment, see Preiser v. Rodriguez, 411 U.S. 475, 98 S.Ct. 1827, 36 L.Ed.2d 439 (1973) (Brennan, J., dissenting); Lauchli v. United States, 405 U.S. 965, 92 S.Ct. 1182, 31 L.Ed.2d 241 (1972) (Douglas, J., dissenting from denial of certiorari), it appears to be settled in the majority of Circuits, including our own, that issue preclusion may indeed apply in such a case. Mastracchio v. Ricci, 498 F.2d 1257 (1st Cir. 1974) cert. den. 420 U.S. 909, 42 L.Ed.2d 838 95 S. Ct. 828; Thistlethwaite v. City of New York, supra; Williams v. Liberty, 461 F.2d 325 (7th Cir. 1972); Metros v. United States District Court, 441 F.2d 313 (10th Cir. 1971); Kauffman v. Moss, 420 F.2d 1270 (3d Cir.), cert. denied, 400 U.S. 846, 91 S.Ct. 93, 27 L.Ed.2d 84 (1970); Shank v. Spruill, 406 F.2d 756

(5th Cir. 1969). (Emphasis added by court)

The willingness of the federal courts to apply collateral estoppel to issues decided in the state courts is apparently founded upon the view that while the police officer is not a party in the criminal action, his rights are adequately protected by the state. In Rosenberg v. Martin, 478 F.2d 520 (2nd Cir. 1973) it is stated at page 525:

Under modern notions with respect to issue preclusion, it is of no moment that the adverse party in the criminal case was the State rather than the police officer who is the defendant here. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971); Zdanok v. Glidden Co., 327 F.2d 944, 954-956 (2 Cir.), cert. denied, 377 U.S. 934, 84 S.Ct. 1338, 12 L.Ed.2d 298 (1964); Bernhard v. Bank of America, 19 Cal.2d 807, 811-813, 122 P.2d 892, 894-895 (1942)

(Traynor, J.); B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 278 N.Y.S.2d 596, 225 N.E.2d 195 (1967); Ritchie v. Landau, 475 F.2d 151, 155 (2 Cir. 1973).

In the instant case, a recognition of the policy underlying collateral estoppel would have prevented injustice by preserving the validity of petitioner's civil rights claim. The court should have examined the record of the antecedent criminal case to determine the issues decided by that judgment, and the court should have precluded further consideration of those issues whose earlier determination was essential to the criminal judgment. Mastracchio v. Ricci, 498 F.2d 1257 (1st Cir. 1974) cert, den. 420 U.S. 909, 42 L.Ed.2d 838 95 S, Ct. 828. Adherence to this procedure would have removed from the jury's consideration any question regarding the probable cause for the illegal arrest.

Even if the doctrine of collateral estoppel is not applied, this case presents Constitutional law questions of great magnitude.

The factual evidence in this instant case was identical to the state criminal case. As a matter of law, no factual question existed for submission to the jury of the issue of probable cause. That is why under state law the case was reversed and final judgment entered for Mr. Waterman.

Can a different result be reached in a subsequent civil rights litigation when facts are not in dispute? Can the identical issue be submitted to the jury in a federal forum?

We think not. The effect of the lower court decisions is to eliminate the use of directed verdicts and summary judgments in civil rights litigation.

The elimination of these trial tools for parties in civil rights litigation raises the most fundamental of Constitutional questions.

Section 1983 hardly represents a remedy if undisputed factual issues can be blurred and a confused jury can deliberate on issues which were already resolved as a matter of law.

CONCLUSION

The present case is of imperative public importance since it involves an apparent exception of the well-settled procedure in Federal Circuits to apply issue preclusion in civil rights litigation. This Court has not yet definitively ruled upon the propriety of the procedure. Since the present case represents a policy to apply issue preclusion selectively to the benefit of those acting under the color of state law and to the detriment of those whose Constitutional rights are violated, an exercise of this Court's power of supervision is clearly warranted. A writ of certiorari should, therefore, issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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PROOF OF SERVICE

I, Charles E. Taylor, Attorney for Joseph Waterman, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 16th day of May, 1977, I served copies of the foregoing Petition for a Writ of Certiorari on the several parties thereto, as follows:

1. On Denver Wray and Steven Kirby, defendants-appellees, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

TO: James R. Kirk, Trial Attorney
Senior Assistant City Attorney
CITY OF COLUMBUS, DEPT. OF LAW
JOHN FRANCIS, CITY ATTORNEY
Robert A. Bell, Of Counsel
90 West Broad Street
Columbus, Ohio 43215
PH: (614) 461-7385

TO: Harold E. Wonnell, Trial Attorney
140 East Town Street
Columbus, Ohio 43215
PH: (614) 224-7291

Charles E. Taylor

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH WATERMAN,

Plaintiff-Appellant

-vs- No. 76-1063

DENVER WRAY ORDER
and
STEVEN KIRBY,

Defendants-Appellees

Before, WEICK, CELEBREZZE and PECK, Circuit Judges.

Upon consideration of the record and the arguments and briefs of counsel, we are of the opinion that the District Court did not err in denying plaintiff's motion for a directed verdict and for judgment n.o.v.

The factual issues of the case were properly submitted to the jury and no prejudicial error occurred at the trial.

It is therefore ORDERED that the judgment of the District Court be and it is hereby AFFIRMED.

ENTERED BY ORDER OF THE COURT.

JOHN P. HEHMAN
John P. Hehman, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOSEPH WATERMAN,

Plaintiff

-vs- Case No. 73-487

BERNARD CHUPKA, et al. JUDGMENT

Defendants

This action came on for trial before the Court and a jury, Honorable Robert M. Duncan, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendants Denver Wray and Steven Kirby recover of the plaintiff Joseph Waterman his costs of action.

Dated at Columbus, Ohio,
October 3, 1975.

JOHN D. LYTER, CLERK

By _____
R.E. Watkin
Deputy Clerk

CITY OF COLUMBUS, APPELLEE

v.

WATERMAN, APPELLANT

City as Columbus v. Waterman (1974), 41 Ohio App.2d 98.

Criminal law -- Unlawful obstruction of police -- Mere refusal to move -- Not prohibited, when -- Arrest process not affected -- Evidence -- Affidavit charging offense.

The mere refusal to move is not such an act as is prohibited by a city ordinance making it unlawful for one to hinder, obstruct, resist, or otherwise interfere with a peace officer in his attempts to arrest another, in the absence of evidence showing that the very presence of the refuser materially affected the arrest process.

(No. 73AP-387--Decided April 16, 1974.)

APPEAL: Court of Appeals for Franklin County.

Mr. James J. Hughes, Jr., city attorney, Mr. Daniel W. Johnson, city prosecutor, and Mr. Clarence Swearingen, for appellee. Mr. Robert M. Draper, for appellant.

HOLMES, J. This matter involves an appeal of a jury verdict and judgment thereon in the Municipal Court of Franklin

County, finding defendant, the appellant herein, guilty of violating ordinance No. 2355.02 of the city of Columbus, the affidavit specifically charging that Joseph Waterman "did unlawfully obstruct Police at the scene of an arrest, to wit, by failing to depart and remain out of the way at an arrest."

The facts in brief upon which this appeal rests are as follows. The defendant was, on the 2nd day of December, 1972, along with a lady friend, walking on South High Street in the city of Columbus, at or about the El Toro Lounge, where a number of police cars had been called in order to assist an officer in the arrest of a man identified as Roscoe Dean.

The testimony indicated that Roscoe Dean, an escapee from a mental institution in Columbus, Ohio, had been intoxicated and was raising a certain disturbance in the El Toro Lounge and a number of officers proceeded to arrest Dean and place him in a police wagon located in front of the lounge. One of the officers involved, a Sergeant McCormick, the senior officer at the scene, testified that he had ordered his subordinates to clear the streets, in that a number of people had gathered at the scene in order to determine what was going on at such location.

There was further testimony that, upon the order from one of the officers for the crowd to disperse, the crowd generally began to move in both directions on High Street, but that Joseph Waterman remained standing some forty feet from the cruiser in which the arrested Roscoe Dean was being held.

Sergeant McCormick's testimony reflects that he first saw the defendant, Mr. Waterman, after he had arrested Roscoe Dean and had placed the latter in the police wagon. The sergeant further testified that at such time the police paperwork, including the arrest form U-10, was being processed and that the arrest of Mr. Dean had been completed, and that there were still people standing on the sidewalk, but that there was no disturbance at such time.

There was further testimony by Officer Smith, who had arrived at the scene, that he had asked people in general if they would move and get out of the area, and he had specifically ordered Mr. Waterman to leave but the latter refused.

Further, an Officer Wray testified that he also had asked the defendant to leave the area but that the defendant refused, stating that he desired to stay at such position because he was an attorney and going to stand right there to make certain that the man in the wagon, who had been arrested, was not beaten. Upon this answer, and Mr. Waterman not moving, Officer Wray proceeded to place him under arrest for interfering with the work of the police officers.

The defendant, in essence, assigns the following errors:

> 1. The trial court erred in its charge to the jury and in overruling defendant's objection to the charge that: "The act of standing is a physical act. A police officer may legally re-

quire persons to depart from the general area where an arrest of another person or persons is being made."

2. "The trial court erred in overruling defendant's objections to the charges and refusing to give the suggested charges furnished by the defendant as follows:

"(a) A citizen has the right of free speech and assembly cannot be denied.

"(b) Access to them for the purpose of exercising the right of free speech and assembly cannot be denied.

"(c) You must find that the defendant used force to interfere with the officer.

"(d) If you find that the defendant only possibly questioned or criticized the police, then you must find him not guilty.

"(e) The mere fact that a person who testifies and is in police uniform is not entitled to any more weight of evidence than any other.

"(f) The number of witnesses which is presented by either side does not constitute a greater weight of evidence.

"(g) The first thing you must understand in considering your verdict is that no weight at all is to be given to the fact that police officers have arrested the defendant or that they have testified against him.

"(h) Statements of police officers are entitled to no greater weight than anyone else's.

"(i) No person is to be considered more believable because he is a police officer."

3. "The trial court erred in that the said verdict and judgment is against the manifest weight of the evidence and said evidence did not sustain the verdict and judgment beyond a reasonable doubt."

4. "The trial court erred in overruling the motion of the defendant to dismiss at the conclusion of the City's case and again at the conclusion of all evidence."

5. "The trial court erred in overruling the motion for a new trial."

We shall discuss the first assignment and the second assignment of error together, in that both allude to the instructions to the jury and the objections thereto, as well as the proffered instructions as presented by the defendant at the conclusion of the evidence at the trial.

We sustain the first assignment of error set forth in the defendant's brief in that the instruction given by the trial court, although accurate in part, is misleading and erroneous when taken as a whole, particularly as it relates to the second portion of the instruction set forth in this decision, to the effect that a police officer may legally require persons to depart from the general area where an arrest of another person, or other persons is being made.

The pertinent part of Columbus Code 2355.02, which the defendant is charged with violating, is as follows:

> "* * * No person shall in any way hinder, obstruct, resist or otherwise interfere with any duly authorized officer or member in the discharge of his offical duties, or attempt to prevent any such officer or member from arresting any person, or attempt to rescue from such officer or member any person in his custody."

It may be noted that the quoted portions of such ordinance proscribe that (1) no person shall in any hinder, obstruct, resist or otherwise interfere with any duly authorized officer or member in the discharge of his official duties; (2) or attempt to prevent any such officer or member from arresting any person; (3) or attempt to rescue from such officer or member any person in his custody.

We are not confronted in this case with situations (2) or (3), in that the

affidavit and warrant here charge that Joseph Waterman "did unlawfully obstruct Police at the scene of an arrest, to wit, by failing to depart and remain out of the way at an arrest."

Pursuant to the first clause of such quoted ordinance, it must be shown that there was an act, or acts, on the part of the defendant, that constituted hindrance, obstruction, resistance, or interference with the discharge of the duties of an authorized officer. The duties of the police officer that might have been interfered with or obstructed were not the acts of clearing the area to avoid possible congestion, unless there is an statutory duty imposed upon a person to obey the order of the police officer.

There are certain statutes and ordinances that confer upon police officers the authority to require persons to move from a given area, such as Columbus Code 2375.04, which deals with persons obstructing free passage on a sidewalk. Another example of the authority conferred upon police officers to give lawful orders or directions is to be found in R.C. 4511.02, relating to traffic control.

Further, as prohibited by R.C. 2923.43, no person may willfully obstruct, impede, or hamper, in any way, the lawful operations of policemen at the scene of fires, accidents, disasters, or emergencies of any kind, and no person shall willfully fail to obey the lawful orders of law enforcement officers engaged in the performance of their duties at the scene of such fires, accidents, disasters or emergencies.

Additionally, R.C. 2923.51, the riot control law, provides the authority for law enforcement officers to give orders to persons to disperse and leave the general area "where five or more persons are engaged in violent or tumultuous conduct which creates a clear and present danger to the safety of persons or property * * *."

However, in this instance, as previously stated, the city is relying upon 2355.02, which does not expressly or by implication give police officers the authority to require persons to move from an area unless there is a hindrance, obstruction, resistance or interference with the discharge of the officer's official duties.

If someone's mere presence prevents the police officer from performing his duty, the officer may require such person to move far enough so as to permit the officer to perform his duty, and a willful failure to do so may constitute an obstruction, or interference, with the officer in the performance of his duties. However, there is no such evidence in this case.

In reviewing the record herein, there is no evidence that Joseph Waterman hindered, obstructed, resisted or otherwise interfered with any duly authorized officer or member in the discharge of his official duties or prevented any such officer from arresting any person or attempting to rescue him. The facts herein show that the person who was disturbing the peace within the lounge had, in fact, been arrested, and the arrest was complete. The man had been placed in the police wagon, and the defendant and his girlfriend were some forty

feet away from the El Toro Lounge and were doing absolutely nothing but standing and watching the proceedings. There has been no allegation or proof that the defendant was blocking the sidewalk, or any part of the area in which the arrest was taking place, or made any move to interfere with or obstruct the procedures of the arrest in question here.

Significantly, the most that the evidence indicates is that defendant was merely a bystander who refused to leave the general area when requested to do so by the police officers, but defendant's remaining in no way interfered with any duty the officers were performing or anything they were doing except their desire to have defendant leave the area. There is no claim that defendant's mere presence was in violation of law, or that his remaining there was in violation of any specific statute or ordinance. Rather, there is the bare assertion that one who does not do that which a police officer tells him to do at the scene of an arrest ipso facto is obstructing the police.

It must also be borne in mind that the precise charge against defendant was that he obstructed the police "by failing to depart and remain out of the way at an arrest." Failing to act, after a request to "remain out of the way at an arrest," in such manner as to impede the police in making and completing the arrest might well constitute an offense under Columbus Code 2355.02. However, there was no evidence that defendant was "in the way" or that he failed to "remain out of the way." Simply stated, there was no evidence that Mr. Waterman committed the

offense with which he was charged, which necessarily is that defined in the affidavit.

Thus, even assuming that the evidence would indicate that defendant obstructed the police in some manner other than that with which he was charged, a conviction cannot be based upon evidence establishing a manner of obstructing other than that specified in the affidavit. See State v Lewis (1970), 21 Ohio St.2d 203. However, as indicated above, we do not find evidence in the record showing the police were obstructed, in any manner. The evidence merely shows that, despite several requests by police, the defendant refused to depart from the general area where an arrest of another had been made and was being completed. If such a refusal to follow the request of the police is to constitute an offense, it must be specifically made so by statute or ordinance. The refusal, under such circumstances, does not constitute an obstruction of the police. Therefore, the first assignment of error is hereby sustained.

The second assignment of error relates to those additions to the general instructions of the jury which were requested by the defendant and rejected by the court. It is our view that such instructions, in part at least, would have been curative of that which had been given previously by the trial court and objected to by this defendant; i.e., the instruction relating to the act of standing and such being a physical act which, combined with the person's presence in the general area, was specified by the court as constituting a violation of such section.

A number of the proffered instructions to the jury were, we feel, correctly explanatory of such prior instruction. Number one, as proffered by the defendant, was to the effect that a citizen has the right to be on the public street and sidewalks, and his mere presence in an area where unlawful conduct is underway does not constitute an offense. We believe this to be a correct general statement of the law and should have been given by the trial court in explanation of his prior instruction.

The proffered instruction number two, as such relates to the act of a person standing on a public street or similar area as being an exercise of First Amendment rights, is not necessarily applicable to this matter, and we shall not pursue this claim in depth. Neither is the proffered instruction number three precise in its legal analysis as such relates to this matter; nor do we accept the proffered instruction number four as to the impossibility of finding a defendant guilty where he has only questioned or criticized the police in the carrying out of their particular duties.

I believe the proffered instruction number five to be a correct one, but such should have been proffered at an earlier time by a written instruction to the court, so the refusal of such is not error. The same comments may be made as to the proffered instruction number six, as were made to instruction number five.

As to the third assignment of error, we hold that, upon a full review of the

record, the verdict and judgment thereon were against the manifest weight of the evidence and contrary to law for the reasons stated above.

The fourth assignment of error is affirmed in that the motion of the defendant to dismiss at the conclusion of the city's case should have been sustained and the fifth assignment of error is affirmed in that the motion for a new trial should also have been sustained.

For all the foregoing reasons, the judgment of the Municipal Court of Franklin County is hereby reversed.

(Emphasis added by the Court)

Judgment reversed.

WHITESIDE AND STRAUSBAUGH, JJ., concur.

STRAUSBAUGH, J., concurring in part.

Here there has been an arrest of a violently disturbed man on the charge of intoxication. The individual has handcuffed and placed into the police wagon where the evidence was that he continued in his wild behavior. The evidence further indicates that a large crowd of people congregated in the immediate area upon the sidewalk, and a large congestion of motor vehicles clogged a main downtown street. In an attempt to restore order, a sergeant gave instructions to one of the police officers to attempt to clear the area and restore order. It was at this time that

the arresting officer issued a request to those on the sidewalk, including the defendant, to move on and clear the area. When the defendant refused to depart after several requests, he was placed under arrest for the violation of Columbus Code 2355.02, which reads in part:

> "* * *No person shall in any way hinder, obstruct, resist or otherwise interfere with any duly authorized officer or member in the discharge of his official duties * * *."

In my opinion, the sergeant, who issued the original order, and his subordinate officer, acted in a proper manner. In other words, there is no question that the arresting officer was duly authorized and was in the discharge of his official duties.

It would also appear there was ample evidence to support a finding that the defendant did hinder and obstruct the officer in the discharge of his duty, of attempting to restore order, during and following the incident for which the officers had been summoned. The fact that the defendant was an attorney would have no bearing on the case. Were these the only facts and circumstances, I would have no hesitancy in affirming the judgment of the trial court.

However, there is an additional factor here which was not covered by the instructions of the trial court to the jury. The defendant testified:

> "* * *I saw a man being beaten, and it was by two officers, not

by one. Now, I can't say for sure that it was Officer Kirby or who it was. But I know there were two officers in there, and they were hitting this man.

"Now, before I had seen them go over to hit him, I had seen him, of course. He was handcuffed with his hands behind his back. He was just sitting there rocking. He was crying, he was mumbling incoherently. Of course, I was farther away and he was inside the wagon, so I especially couldn't hear what he said. And he was bleeding at the mouth."

Although the fact that the defendant was an attorney would not otherwise make any difference in this case, it would have had a bearing had the jury believed the testimony above set forth. As an officer of the court, the defendant had a duty to have witnessed any violations of the defendant's civil rights. Although it may be argued that the jury, by its finding, did not believe the defendant and did not find these facts to be true, the jury was not instructed with respect to these matters, which were clearly in evidence. There was a duty on the part of the trial court to so charge in the interest of substantial justice and, for this reason, I would reverse and remand this matter for retrial.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH WATERMAN,

Plaintiff-Appellant

-vs- Case No. 76-1063

BERNARD CHUPKA, et al.,

Defendants-Appellees

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Joseph Waterman, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final order affirming the judgment of the United States District Court, Southern District of Ohio, Eastern Division, entered in this action on February 15, 1977.

This appeal is taken pursuant to 28 USC, Section 1254(1).

II. The clerk will please prepare the entire transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript all exhibits.

III. The following questions are presented by this appeal:

1. Whether federal courts may selectively apply issue preclusion in civil rights litigation and thus relitigate issues which were essential to an antecedent criminal judgment and which were resolved in the state courts.

2. Whether the use of Motions for Summary Judgment and Directed Verdicts in civil rights litigation may be effectively abolished by submitting an issue to the jury in a federal forum which is identical to an issue resolved by the state court in the antecedent criminal case.

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Attorney for Plaintiff-Appellant

PROOF OF SERVICE

I, Charles E. Taylor, Attorney for Joseph Waterman, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 13th day of May, 1977, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

1. On Denver Wray and Steven Kirby, defendants-appellees, by mailing copies in duly addressed envelopes, with the first

class postage prepaid, to their respective attorneys of record, as follows:

TO: James R. Kirk, Trial Attorney
Senior Assistant City Attorney
CITY OF COLUMBUS, DEPT. OF LAW
JOHN FRANCIS, CITY ATTORNEY
Robert A. Bell, Of Counsel
90 West Broad Street
Columbus, Ohio 43215
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TO: Harold E. Wonnell, Trial Attorney
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Columbus, Ohio 43215
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Charles E. Taylor
Attorney for Appellant

Supreme Court, U. S.
FILED
JUN 10 1977
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1749

JOSEPH WATERMAN,

Petitioner,

vs.

BERNARD CHUPKA, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In The

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

———

GROUNDS FOR DENIAL OF WRIT OF CERTIORARI

The respondents pray that a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit be denied and that the decision of the United States Court of Appeals for the Sixth Circuit be affirmed for the following reasons:

I. The issues set forth in the petition for the writ of certiorari by the petitioner herein were not raised in the U. S. District Court for the Southern District of Ohio, Eastern Division, or in the United States Court of Appeals for the Sixth Circuit and are here urged for the first time.

II. The issues so urged were not present in the Franklin County, Ohio, Municipal Court, the Court of Appeals for the Tenth District of Ohio, the United States District Court for the Southern District of Ohio, Eastern Division, or the United States Court of Appeals for the Sixth Circuit.

III. The petition for a writ of certiorari erroneously interprets the decision of the Tenth District Court of Appeals of the State of Ohio insofar as it concludes that court decided the issue which was present in the instant civil rights case and that it finally decided the issue in the local Court on behalf of the petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The within brief is filed in accordance with Rule 24 of the Supreme Court Rules.

STATEMENT OF THE CASE

On August 22, 1973, after a three day jury trial in the Franklin County, Ohio, Municipal Court, the petitioner was found guilty by the jury of a violation of Columbus, Ohio, Municipal Ordinance, § 2355.02, for unlawfully obstructing members of the Columbus Police Department at the scene of an arrest. This conviction is based essentially upon the following facts.

On the night of December 2, 1972, there was a disturbance at the El Toro Lounge on South High Street in Columbus, Ohio, and one Officer Ruda of the Columbus Police Department caused an officer in trouble signal to be broadcast. (R. 393-397) Respondent, Officer Denver Wray, responding to that call was the first to arrive on the

scene. (R. 395) He immediately went into the El Toro Lounge and encountered Officer Ruda in a scuffle with one he recognized as Roscoe Dean, with whom he had previous contact. (R. 397) He knew Dean to be a mental case who was very physical after drinking. (R. 397) Wray assisted Ruda in arresting Roscoe Dean and escorted him to the rear of a police vehicle where he was placed inside. (R. 398) Dean was placed in the extreme left rear portion of the wagon next to the rear door. (R. 399)

There had gathered a large crowd of onlookers and upon orders of Sergeant McCormick, the immediate superior of Wray and several other officers who had arrived, Wray and others began an effort to clear the scene of the arrest of Dean and others. (R. 401) Officer Wray saw Officer Smith endeavoring to move the crowd away from the scene of the arrest and heard the petitioner, Waterman, say; "I'm an attorney and a United States citizen, and I don't have to move." (R. 403) In the ensuing encounter between Officer Wray and Waterman when the latter was asked to leave the immediate scene, Waterman told Officer Wray he would not move and that if he were arrested, it would be the sorriest day of Officer Wray's life. (R. 404) Arrests were still underway and Waterman was standing at the curb in a position so he could look inside the side door of the police vehicle which was parked at an angle to the curb headed in a southwest direction. (R. 158, 223, 227, 236, 403) When Waterman came on the scene, no one except Roscoe Dean had been arrested and placed in the wagon. (R. 153) While the officer in trouble signal had been terminated, there was still a disturbance and arrests were being made. (R. 30-31) Waterman was at the entrance to the side of the police vehicle with a female companion. (R. 27-28) When asked to move out of the way and back from the wagon, Waterman refused although

his female companion moved out of the immediate area. (R. 31-32) Waterman was arrested and charged with violating § 2355.02 of the Columbus City Code.

Following his conviction, the petitioner filed his appeal with the Court of Appeals for Franklin County, Ohio; that is the Tenth District of Ohio Court of Appeals. The decision in that case is reported at 41 Ohio App. 2d 98. (A printed copy of that opinion is annexed to petitioner's petition for writ of certiorari. Appendix, page 24.)

Subsequent to the decision of the Franklin County, Ohio, Court of Appeals, the petitioner brought the instant action in the U. S. District Court, which was heard by a jury on September 29, 30, and October 1 and 2, 1975, resulting in a verdict in favor of the respondent police officers.

Petitioner then on November 3, 1975, filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit in Cincinnati, Ohio. The sole questions presented by petitioner in that appeal were as follows:

1. Whether the trial court erred in denying plaintiff-appellant's motion for directed verdict on the ground of considering the evidence in its best light for defendants-respondents reasonable minds could not differ from the conclusion that defendants were liable to plaintiff.
2. Whether the trial court erred in denying plaintiff's motion for judgment notwithstanding the verdict on the basis that no evidence was introduced at trial that could support the verdict returned.

Following argument on February 4, 1977, the United States Court of Appeals for the Sixth Circuit by order filed February 15, 1977, affirmed, the actions of the United States District Court in submitting the case to the jury and found that no prejudicial error had occurred at the trial.

ARGUMENT

GROUND No. I

THE ISSUES SET FORTH IN THE PETITION FOR THE WRIT OF CERTIORARI BY THE PETITIONER HEREIN WERE NOT RAISED IN THE U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION, OR IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND ARE HERE URGED FOR THE FIRST TIME.

It is elementary and well settled that the Supreme Court does not give consideration to issues not raised in the courts below. *Hormel* v. *Helvering*, 312 U.S. 552 at 556, 85 L.Ed. 1037 at 1041, 61 S.Ct. 719, and *Walters* v. *St. Louis*, 347 U.S. 231 at 233, 98 L.Ed. 660 at 664, 74 S.Ct. 505.

Petitioner urges as the second question presented by his petition that motions for summary judgment and directed verdicts in civil rights litigation may be effectively abolished by actions of the trial courts as taken in the instant case. It should be noted at the outset that at no time was a motion for summary judgment sought. The only matter with respect to a directed verdict is so brief that it is set forth here in its entirety from page 428 of the record in the U. S. District Court.

> MR. CONNOR: If it please the Court, we would move the Court to direct a verdict on the question of liability in our favor due to the fact that based upon the law as the Court has indicated it understands the law and will instruct the jury as such, it would appear that the Court can find, as a matter of law, even giving the Defendants — considering the Defendants' evi-

dence in its best light that there is no question that Joseph Waterman did not interfere at the scene of the arrest of Roscoe Dean or the other three people that were arrested on December 2, 1972.

In the brief of the petitioner filed in the United States Court of Appeals for the Sixth Circuit, the sole questions presented are as follows:

1. Whether the trial court erred in denying plaintiff-appellant's motion for directed verdict on the ground that considering the evidence in its best light for defendants-respondents reasonable minds could not differ from the conclusion that defendants were liable to plaintiff.
2. Whether trial court erred in denying plaintiff's motion for judgment notwithstanding the verdict on the basis that no evidence was introduced to trial that could support the verdict returned.

It is clear that at no time in the United States District Court for the Southern District of Ohio, Eastern Division, or in the United States Court of Appeals for the Sixth Circuit, did petitioner raise the issues he now urges in support of his petition for writ of certiorari.

GROUND No. II

THE ISSUES NOW URGED WERE NOT PRESENT IN THE FRANKLIN COUNTY MUNICIPAL COURT, THE COURT OF APPEALS FOR THE TENTH DISTRICT OF OHIO, THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION, OR THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioner urges explicitly and seeks to cite cases in support of his contention that since his conviction growing out of a violation of an ordinance of the City of Columbus, Ohio, was reversed by the Franklin County, Ohio, Court of Appeals, the doctrine of collateral estoppel operates to bar the United States District Court from submitting the question of good faith probable cause, on the part of respondents, to the jury impaneled to hear the facts in his civil rights case. While in certain fact patterns, the doctrine of collateral estoppel may apply, this proposition is clearly inapplicable in the instant case since the issues urged were not present in any of the preceding cases before the civil rights case and the parties and the facts were different.

The issue in the petitioner's criminal trial before the Franklin County Municipal Court was whether or not the petitioner had violated § 2355.02 of the Columbus City Codes.

The issues presented by the petitioner to the Franklin County, Ohio, Court of Appeals in no way encompass the issue of fact which was before the United States District Court jury. A brief reference to the assignments of error made by the petitioner to the Franklin County, Ohio,

Court of Appeals appearing from the bottom of page 99 through page 100 of that Court's decision reveals that the issue in the civil rights case was never presented to the Court of Appeals in Franklin County, Ohio, and for that reason to urge the doctrine of collateral estoppel is erroneous.

The record at page 429 and page 430 reveals that the petitioner conceded that an appropriate issue upon which the U. S. District Court should charge the jury was the issue of good faith probable cause, on the part of respondents. At that place in the record the U. S. District Court Trial Judge invited comment concerning objections, additions, alterations, or omissions to the charge. At that juncture in time, the petitioner did not raise the doctrine of collateral estoppel or in anyway urge it upon the Court. At no time was it inferred that the Franklin County, Ohio, Court of Appeals decision had a res judicata effect upon the civil rights case then to be decided by a jury in the U. S. District Court.

The issues presented to the United States Court of Appeals for the Sixth Circuit by the petitioner make it eminently clear that the petitioner did not *then* think that the Franklin County, Ohio, Court of Appeals decision worked in any way as a bar to the determination by a jury sitting in the U. S. District Court of the factual issue of good faith probable cause.

While the cases cited by the petitioner are in some respects supportive of the doctrine of collateral estoppel, they are not in point in the instant case. *Mastracchio* v. *Ricci,* 498 F.2d 1257 (1st Cir. 1974), is a case resulting in a summary judgment against the plaintiff wherein while a state criminal proceeding was not yet terminated, the plaintiff brought a civil rights action based upon alleged

perjured testimony of a police detective. At page 1259 of that decision the following language appears:

> . . . when Civil Rights action is brought in Federal Court which presents same issue which was decided in a prior state civil action that prior state judgment *may have* a collateral estoppel (or res judicata) effect upon the Federal suit.
>
> (Emphasis writers.)

At page 1260 there is the following language:

> . . . Collateral estoppel operates, *of course, only as to matters actually litigated and decided at the prior trial. . . .*
>
> (Emphasis writers.)

In substance, *Mastracchio* holds that prior state action *may have* a collateral estoppel effect but *only* as to matters actually litigated and decided at the prior trial. Such is not the case here and thus *Mastracchio* becomes more authoritative for the respondents than for the petitioner.

The same is true of the decision in *Rosenberg* v. *Martin,* 478 F.2d 520 (2d Cir. 1973), a case involving a judgment against a former police inspector in favor of a prisoner which was reversed on appeal with instructions to dismiss the complaint. It should be noted, that the identical issue, it was held, had been twice litigated against the plaintiff. The issue there was deprivation of a right to a fair trial because of publicity releases by a former police inspector. *Rosenberg* is distinguishable because it was held that the identical issue had been twice litigated. In the instant case the identical issue was never litigated until originally in the civil rights action in the United States District Court.

The case of *Pyles* v. *Keane,* 418 F.Supp. 269, (D.C. S.D., N.Y., 1976) stands only for the proposition that the doc-

trine of collateral estoppel can be raised and considered upon a pre-trial motion to dismiss. Therein a motion to dismiss a prisoner's action against police officers for declaratory judgment and money damages for alleged violations of civil rights was sustained. The suit was based upon denial of assistance of counsel, search and seizure, as well as malicious prosecution. The case is simply not in point.

In *Cromwell* v. *County of Sac,* 94 U.S. 351, 24 L.Ed. 195 (1876), it was held that the issue was not the same and estoppel did not lie in an action against an Iowa county upon interest coupons issued for the erection of a courthouse. That is no authority for the propositions which are urged by petitioner herein. For further authority that the issues must be the same, see *Preiser* v. *Rodriguez,* 411 U.S. 475, 36 L.Ed. 2d 439, 93 S.Ct. 1827 (1973), where the question presented to the Court was whether the action was in habeas corpus requiring exhaustion of state's remedies or Civil Rights and petitioning prisoners sought to persuade the Court to follow cases regarding prison conditions rather than early or speedier release. The Court refused to embrace a collateral estoppel since the issues were not the same.

Even if the doctrine of collateral estoppel had been raised before the U. S. District Court, such an objection would have been properly overruled. It is respectfully submitted that since the issues now urged were not present, the trial court properly charged the jury and in so doing followed the law of the State of Ohio as enunciated in the very case which petitioner urged upon the Court; to wit, *City of Columbus* v. *Waterman,* 41 Ohio App. 2d 98.

GROUND No. III

Petitioner at page 18 of the Petition for Certiorari filed herein alleges that the factual evidence in the instant case was identical to the state criminal case. Respondent respectfully submits that this is not true. This may be a minor point of contention; however, in any event, the Court is in no position to determine whether the allegation made on page 18 is true or false inasmuch as the record of the state criminal proceeding is not before this Court.

Further, at page 18, petitioner states that under state law the case was reversed and final judgment entered for the petitioner. At no place in the opinion of the Franklin County, Ohio, Court of Appeals in *Columbus* v. *Waterman,* 41 Ohio App. 2d 98, is there any language entering final judgment for the petitioner. As a matter of fact, at page 105 of that opinion, the Court sustained the fifth assignment of error of the petitioner on the ground that his motion for a new trial should have been sustained. The granting of a new trial in no way is a final judgment for the petitioner. In the concurring opinion of J. Strausbaugh in sustaining assignments of error raised by the petitioner, at page 106, that eminent jurist indicates ". . . *I would reverse and remand this matter for re-trial. . . .*" Certainly no one can successfully contend that language supports the conclusion that a final judgment was rendered on behalf of the petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied for the reasons that the issues now raised by petitioner were not timely raised, either in the U. S. District Court or in the U. S. Court of Appeals for the Sixth Circuit and properly so because the issues now urged were not present in the Franklin County, Ohio, Municipal Court, the Court of Appeals for the Tenth District of Ohio, the United States District Court for the Southern District of Ohio, Eastern Division, or the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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